No. 85-1513

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

EDWIN W. EDWARDS, in his Official Capacity as Governor of Louisiana, WILLIAM J. GUSTE, JR., in his Official Capacity as Attorney General of Louisiana, LOUISIANA DEPARTMENT OF EDUCATION, and THOMAS G. CLAUSEN, in his Official Capacity as Superintendent of Education of Louisiana,

Appellants,

– against –

DON AGUILLARD, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

AMICUS CURIAE BRIEF OF THE STATE OF NEW YORK, JOINED BY THE STATE OF ILLINOIS

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TABLE OF CONTENTS

PAGE

Interests of the *Amici Curiae* and Summary of Argument 1

ARGUMENT

POINT I –

CREATIONISM IS NOT SCIENCE AND ITS INCLUSION IN THE PUBLIC SCHOOL CURRICULA WILL DILUTE THE QUALITY OF SCIENCE EDUCATION AND SERVE SOLELY SECTARIAN PURPOSES 4

A. Creationism is not Science and its Inclusion in the Nation's Texts and Curricula Would Diminish the Quality of Science Education in the Public Schools 4

B. If Held Constitutional, the Balanced Treatment Act's Purely Religious Purpose Will Be Reflected in the Nation's Textbooks and Teaching Materials 7

POINT II –

BECAUSE THE BALANCED TREATMENT ACT THREATENS TO TRANSFORM THE NATION'S PUBLIC SCHOOLS INTO FORUMS FOR THE TEACHING OF RELIGION, IT VIOLATES THE FIRST AMENDMENT 17

CONCLUSION 22

TABLE OF AUTHORITIES

	PAGE
Aguillard v. Edwards, 765 F.2d 1251 (5th Cir. 1985)	17, 18
Ambach v. Norwick, 441 U.S. 68 (1980)	1
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PAGE

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PAGE

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Appellants,

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

INTERESTS OF THE *AMICI CURIAE* AND SUMMARY OF ARGUMENT

The State of New York, joined by the State of Illinois, submits this brief *amicus curiae* in support of appellees, urging the Court to uphold the decision below.

This Court has declared that public education "fulfills a most fundamental obligation of government to its constituency," *Ambach v. Norwick*, 441 U.S. 68, 76 (1980), *quoting, Foley v. Connelie*, 435 U.S. 291, 297 (1978); *see also Brown v. Board of*

Education of Topeka, 347 U.S. 483, 493 (1954), and that "providing public schools ranks at the very apex of the functions of a state". *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972). Accordingly, New York and Illinois have a compelling interest in protecting the quality and integrity of their public school systems.

The requirement of Louisiana's Balanced Treatment Act that "creation science" be taught as part of the science curriculum in public schools violates the First Amendment and disserves public education throughout the Nation. Viewed objectively, scientific creationism is firmly rooted on the religion side of the wall of separation between church and state erected by the framers of the Constitution. Similarly, it is well outside the fields of inquiry that constitute "science", as that term is understood by recognized organizations that employ the scientific method of investigation. Indeed, following careful investigation, New York has concluded that " 'scientific creationism' is not accepted as a science by the majority of experts working in those fields of science relating to origins. It is considered by those experts to be in the field of study more closely related to religion than science."[1]

Because creationism is a religion, it may not lawfully be taught in our Nation's public schools, for its teaching entangles the states in the establishment of religion.

Moreover, the forced inclusion of creationism in the science curriculum is destructive of science education, a course of instruction that is essential to this Nation's health and security. Virtually all classroom instruction is determined by the content of textbooks. Although evolution is one of the cornerstones of modern biology, many textbook publishers, as a concession to creationists, have altered substantially their treatment of evolution and thereby diluted the overall quality of the science books used in schools. The means used include segregation of evolutionary theory (in order to enable teachers to omit the topic), severe reduction of

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[1] *See New York State Board of Regents' Biology Syllabus*, Appendix at 137 (1983) (creationism should not be incorporated in biology curriculum).

the space devoted to evolution, elimination of known facts that are inconsistent with the creationist view of the origins of humans, and, most cynically, evasion of evolution as an established scientific fact. Such departures from vigorous standards for the teaching of science harm the Nation's ability to produce men and women who possess the training in science to provide needed medical and life science services. Likewise, the failure of public schools to adhere to the most rigorous standards in the study of science destroys the Nation's capacity to establish and maintain its leadership in science and technology, the bedrock on which our economic and strategic security rests.

ARGUMENT

POINT I

CREATIONISM IS NOT SCIENCE AND ITS INCLUSION IN THE PUBLIC SCHOOL CURRICULA WILL DILUTE THE QUALITY OF SCIENCE EDUCATION AND SERVE SOLELY SECTARIAN PURPOSES.

A. *Creationism is not Science and its Inclusion in the Nation's Texts and Curricula Would Diminish the Quality of Science Education in the Public Schools.*

Notwithstanding appellant's arguments to the contrary, the reputable scientific community has concluded that creationism is not a valid science worthy of inclusion in the science curriculum.[2] Accordingly, after meeting with representatives of the scientific community, education officials in New York State recommended against the incorporation of creationism in the biology curriculum. Their recommendation states:

> It should be understood that "scientific creationism" is not accepted as science by the majority of experts working in those fields of science related to origins. It is considered by these experts to be a field of study more closely related to religion than to science.[3]

Prior to the 1960's, science education received little emphasis in the United States. The Soviet Union's launching of the Sputnik satellite in 1957, however, spurred this Nation to modernize

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[2] The number of established and respected scientific organizations who are appellees in this action is evidence of this fact; *see also New York State Board of Regents' Biology Syllabus*, *supra* note 1, at 137 (1983) (American Association for Advancement of Science, the American Institute for Biological Sciences, the National Association of Biology Teachers, and the New York Academy of Sciences recommended against inclusion of creationism in the science curricula); *National Association of Biology Teachers' Position on Scientific Integrity*, Am. Biology Teacher, Oct. 1982, 44; Moore, *Creationism in California*, Daedulus, Summer 1974, 181 (American Chemical Society and American Association of Physics Teachers opposed inclusion of creationism in California curriculum); *see generally* D. Futuyma, *Science on Trial : The Case For Evolution* (1983).

[3] *New York State Board of Regents' Biology Syllabus*, *supra* note 1, at 137.

its teaching of science. As a result, the National Science Foundation funded a variety of programs which revamped science curricula and textbooks to include an unprecedented emphasis on evolution. *See generally McLean v. Arkansas*, 529 F. Supp. 1255, 1259 (E.D. Ark. 1982).[4] This Court's decision in *Epperson v. Arkansas*, 393 U.S. 97 (1965), striking down an Arkansas statute that made the teaching of evolution illegal,[5] further buttressed reforms in science education.

The study of science, including evolution, is now a core part of educational curricula.[6] Science education vests youngsters with a foundation of knowledge necessary to understand today's technology, and upon which they can build to help advance the technology of tomorrow.[7] In addition, equipping children with a firm science education will enable some to later pursue careers in medicine and other health sciences.[8] Moreover, science training

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[4] *See also* Nelkin, *The Science Textbook Controversy*, Sci. Am., April 1976, 33; Skoog, *The Coverage of Evolution in High School Biology Textbooks Published in the 1980's*, 68 Sci. Educ. 117-128 (1984); Grabiner & Miller, *Effects of the Scopes Trial*, 185 Sci. 832, 836 (George Baylord Simpson stated "One hundred years without Darwin are enough.").

[5] *See* Gieryn, Bevins & Zehr, *Professionalization of American Scientists: Public Science in the Creation/Evolution Trials*, 50 Am. Soc. Rev. 392, 400 (1985) [hereinafter cited as Gieryn].

[6] *See* Bird, *Freedom of Religion and Science Instruction in Public Schools*, 87 Yale L.J. 515, 531 n. 76, 101 (1978) (discussing importance of biology courses in secondary schools); W. Moyer & W. Mayer, *A Consumer's Guide to Biology Textbooks*, at 11 (1985) [hereinafter cited as *Consumer's Guide*].

[7] P. Kitcher, *Abusing Science: The Case Against Creationism*, at 173 (1982). Those challenges clearly await the Nation's youth. *See, e.g., Soviets Building Atom Smasher, World's Biggest*, N.Y. Times, July 27, 1986, § A, at 1, col. 5.

[8] Kitcher, *supra* note 7, at 173; *see also* Gieryn, *supra* note 5, at 398 (quoting resolution of American Medical Association to same effect); *McLean v. Arkansas*, 529 F. Supp. at 1273.

instills a spirit of inquiry and imparts a method of reasoning and analysis applicable to many aspects of life.[9] For example, leadership roles in government or industry require the ability to reason and solve problems, unfettered by superstition or myth — skills attained through science training.[10] Full participation in democracy similarly demands these skills.[11] Indeed, creationists themselves have recognized the value of science education:

> Science has innumerable social implications and applications. Solutions to social problems require real understanding of the origin of the physical processes which affect them (e.g., nuclear energy, fossil fuels, ecology, genetic engineering, hallucinogenic drugs, etc.). Each person needs, more than anything, a sense of his own identity and personal goals, and this is impossible without some sense of his origin....Lack of a sound scientific understanding of origins and meanings among modern young people has impelled them to seek help in such antiscientific solutions as "mind-expanding" drugs, witchcraft, astrology, and the like.[12]

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[9] *See* M. Ruse, *Darwinism Defended-A Guide to the Evolution Controversies*, at 327-328 (1983); Moyer & Mayer, *Preface* to *Consumer's Guide*, *supra* note 6, referring to E. Boyer, *High School*, at 302-303 (1983); P. Kitcher, *supra* note 7, at 173; Eldridge, *Are "Scientific Creationists" Right about Darwin Being Wrong?* Educ. Leadership, Dec. 1981, at 216; *see also* Shanker, *Where We Stand*, N.Y. Times, Aug. 1, 1982, § E, at 9, col. 5 (President of New York City Teachers' Union discussing objectives of science education); Parker, *Meet the Textbook Crusaders: Your Schools May Be the Next Battlefield in the Crusade Against "Improper" Textbooks*, Am. School Board J., June 1979, 21, 24 (creationism advocates have made the word "inquiry" a "dirty word").

[10] Kitcher, *supra* note 7, at 173.

[11] *Id.*; *see generally* 9 *Writings of James Madison* 103 (G. Hunt ed. 1910) ("And a people who mean to be their own Governors must arm themselves with the power which knowledge gives").

[12] D. Nelkin, *The Creation Controversy: Science or Scripture in the Schools*, at 68 (1982), *quoting*, Institute for Creation Research, Scientific Creationism for Public Schools, at summary (Nov. 1971).

Given its potential impact on the textbook industry, *see* Point B, *post*, the Louisiana Act threatens to destroy the advances made in science education and the quality of science education that will be provided nationwide. Indeed, as discussed below, the quality of textbook coverage of evolution has already suffered significant setbacks. *Id.*

B. *If Held Constitutional, the Balanced Treatment Act's Purely Religious Purpose Will Be Reflected in the Nation's Textbooks and Teaching Materials.*

Seventy-five to ninety-five percent of classroom instruction is determined by the content of textbooks.[13] Religious fundamentalists have recognized not only the crucial role of textbooks in education, but that control over the Nation's curriculum hinges on control of the textbook industry. According to one fundamentalist,

> Textbooks have become absolutely obscene and vulgar. Many of them are openly attacking the integrity of the Bible. Humanism is the main thrust of the public school textbook. Darwinian evolution is taught from kindergarten right through high school. For our nation, this is a life-and-death struggle and the battleline for this struggle is the textbooks.[14]

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[13] *Schoolbooks: A Question of Quality*, Hartford Courant, June 15, 1986, § A, at 1, col. 2 (referring to studies); Podesta, *Foreword* to *Consumer's Guide*, *supra* note 6; *see also* Hechinger, *The Irreversible Effects of the "Creationism" Furor*, N.Y. Times, Jan. 5, 1982, § C, at 7, col. 7 (all but best teachers rely on texts); *cf.* F. Fitzgerald, *America Revisited*, at 19 (1980) (discussing social studies texts). A textbook is the "principal book or set of materials, the subject matter of which is designed to support a course of study." Assoc. of Am. Publishers, Am. Lib. Assoc. & Assoc. for Supervision and Curriculum Dev., *Limiting What Students Shall Read*, at 25 n. 4 (1981) [hereinafter cited as *Limiting What Students Shall Read*]. Supplementary classroom materials are "additional books and instructional materials" used to support, expand and enrich the curriculum. *Id.*; *accord*, N.Y. Educ. Law § 701(2) (McKinney) (textbook is any book required for use in a particular class).

[14] Welch, Medeiros & Tate, *Education, Religion and the New Right*, Educ. Leadership, Dec. 1981, 202, 204, *quoting*, *Textbooks in Public Schools : A*

(footnote continued)

Textbook publishers are easily conquered in this battle, producing texts that conform to the demands of a nationwide marketplace, rather than to the needs of individual states or to principles of scholarly integrity.[15] As one publisher explained, "We're a national publisher, so we look at the curriculum requirements of all the states.[16] Another has acknowledged,

> Some people have tended to feel that publishers establish school curricula. That's wrong. It's a competitive market. Anyone who tries to lead, to direct the curriculum, will be left on the shelf. If we can meet the needs better than anyone else, our textbooks will be the ones purchased.[17]

With twelve companies dominating a market which produces relatively few books,[18] competition is fierce.[19] And the competition is fiercest to corner the guaranteed sales of the twenty-two

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Disgrace and Concern to Americans, J. Champion, May 4, 1979, 8. Mel Gabler, Texas textbook watcher, proponent of creationism and co-founder of Educational Research Analysts, a group involved in textbook evaluation and censorship has said, "Textbooks mold nations because they largely determine how a nation votes, what it becomes and where it goes." Parker, *supra* note 9, at 24.

[15] Dahlin, *A Tough Time For Textbooks*, Publisher's Weekly, Aug. 7, 1981, 28; Nelkin, *supra* note 12, at 153-154 (1982); *accord*, English, *Can Social Studies Textbooks Have Scholarly Integrity?* Social Educ., Jan. 1986, 46.

[16] Yen, *California Rejects Science Textbooks as Inadequate on Evolution*, Publisher's Weekly, Sept. 27, 1985, 28, 29 (quoting McMillan publishing executive).

[17] Dahlin, *supra* note 15, at 32 (quoting textbook executive).

[18] The relative paucity of available books is illustrated by the fact that a mere eighteen books were submitted for "adoption," see notes 20-23 *infra* and accompanying text, for use in biology classes in Texas in April of 1984. Although this figure does not reflect all titles available, it nevertheless represents a large percentage of the total, since presumably, most publishers compete for the lucrative Texas market. *See* Moyer & Mayer, *Preface* to *Consumer's Guide*, *supra* note 6.

[19] De Silva, *For Publishers, Schools Yield Big Sales, Big Profits*, Hartford Courant, June 17, 1986, § A, at 10, cols. 1-6. The competition is particularly keen since

(footnote continued)

adoption states[20] — states such as Louisiana — which have textbook commissions that determine which books can be purchased with state funds for use in the public schools.[21] In contrast, in "open states" such as New York, local school boards are vested with the authority to select and purchase books,[22] and the certainty of bulk sales is less likely.[23]

Capitulating to pressures exerted by fundamentalists and attempting to avoid controversy, publishers in the last ten years have increasingly watered down the discussions of evolution contained in their texts.[24] The watering-down of texts is accomplished

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textbook sales are generally accompanied by sales of workbooks, tests, teachers' guides and supplementary materials. *See* Lorimer, *Publishers, Governments, and Learning Materials: The Canadian Context*, 14 Curriculum Inquiry, 287, 289 (1984).

[20] The twenty-two adoption states are: Alabama; Arizona; Arkansas; California; Florida; Georgia; Idaho; Indiana; Kentucky; Louisiana; Mississippi; Nevada; New Mexico; North Carolina; Oklahoma; Oregon; South Carolina; Tennessee; Texas; Utah; Virginia; and West Virginia. Of these states, Texas and California are the largest adoption states. *Limiting What Students Shall Read*, *supra* note 13, at 15 (1981).

[21] *Id.*; Dahlin, *supra* note 15, at 29-30. The requirements vary with each adoption state; in some states, only one text book may be purchased, in others, more than one will be purchased. *Id.*; *see also* Kamhi, *Censorship v. Selection — Choosing the Books Our Children Shall Read*, Educ. Leadership, Dec. 1981, 211.

[22] *See* N.Y. Educ. Law § 701(3) (McKinney).

[23] *Limiting What Students Shall Read*, *supra* note 13, at 15.

[24] Skoog, *supra* note 4 (coverage of evolution has declined 20 to 80 percent in most popular school texts); *Books Water Down Study of Evolution*, Hartford Courant, § A, at p. 4, cols. 4-6; *see also* Nelkin, *supra* note 12, at 153; *Evolution in Textbooks*, Sci. Integrity, Winter 1986, 1.

in a variety of ways. In some texts, evolution has been excised;[25] in others it receives only cursory coverage. For example, one recent text is 578 pages long, but contains only three pages on evolutionary theory.[26] Other texts contain discussions of evolution in a single chapter and do not integrate evolutionary theory with any other topics, as is pedagogically correct. This enables the teacher to easily omit the topic.[27] Comparisons between earlier texts and recent texts underscore the extent to which the amount of space devoted to evolution is steadily declining. For example, the 1981 edition of one text contained a total of 4,314 words on evolution, whereas the 1968 edition of that same text contained 22,121 words.[28] Similarly, the 1977 edition of one text contained sixteen illustrations of different time scales depicting and comparing evolutionary histories of various organisms. All sixteen of these illustrations were deleted in the 1981 edition of the text.[29] Neither in these texts, nor in others in which coverage of evolution was reduced, was there a corresponding reduction of coverage of other topics or an overall shortening of the text.[30]

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[25] Consumer's Guide, *supra* note 6, at 29, discussing P. Watkins, D. Chang-Van-Horn & H. Kron, *Biology For Living* (Silver Burdett: 1985); *see also Books Water Down Study of Evolution*, *supra* note 24, Hartford Courant, A, at 4, col. 5 (mentioning books which omit evolution).

[26] *Consumer's Guide*, *supra* note 6, at 26, discussing A. Kaskel, P. Hummer & L. Daniel, *Biology: An Everyday Experience*, at 500, 501, 504 (Charles E. Merrill: 2d ed. 1985).

[27] *Consumer's Guide*, *supra* note 6, at 31, 51, 60-61 discussing H. Wong & M. Dolmatz, *Biology: The Key Ideas* (Prentice Hall: 1983), A. Kormondy & B. Essenfeld, *Addison-Wesley Biology*, at 589-618 (1984), J. McLaren & L. Rotundo, *Heath Biology* (1985).

[28] Skoog, *supra* note 4, at 121, discussing W. Smallwood & E. Green, *Biology* (Silver Burdett: 1968, 1981).

[29] Skoog, *supra* note 4, at 121, discussing J. Otto & A. Towle, *Modern Biology* (Holt, Rinehart & Winston: 1977) and J. Otto, A. Towle & J. Bradley, *Modern Biology* (Holt, Rinehart & Winston: 1981).

[30] Skoog, *supra* note 4, at 119-120, 125.

Furthermore, in presenting evolution, many texts fail to teach the student that evolution is a cornerstone of modern biology, universally recognized by the reputable scientific community.[31] In these texts, coverage of evolution is marked by evasive, qualifying language. Typical examples of this approach are: "...Darwin suggested a mechanism for evolution that *seems* to agree with today's research in this field"[32]; "One thing you should keep in mind is that these explanations [of evolution] *are only ideas*. However, *these ideas* may help you to know how *some people think life* began"[33]; and "What would you find if you could trace the history of primates back ten million years? You *might find* that both modern humans and modern apes have evolved from some early primate."[34]

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[31] Creationists have exploited the description of evolution as a "theory" to suggest that it is not an accepted fact. In scientific usage, however, the term "theory" is not synonomous with the term "hypothesis", but rather, refers "to generalizations about facts and explanations of facts, based on and tested by facts." As noted scientist Stephen Jay Gould explained, "One has to make a distinction between two aspects of evolution as Charles Darwin himself always did, namely, there is the fact of evolution and that evolution has occurred is as well established as anything in science. One might as well deny gravity as deny evolution occurred. On the other hand, there are theories that try to explain the mechanism of how evolution occurred and as with all theories there is a lot of healthy debate." Hughes, *The Fact and the Theory of Evolution*, Am. Biology Teacher, Jan. 1982, 25, 27 (citations omitted).

[32] *Consumer's Guide*, *supra* note 6, at 85, 88, 89, discussing P. Bauer, M. Magnoli, A. Alvarez, D. Chang-Van Horn & D. Gomes, *Experiences In Biology*, at 471 (Laidlaw: 1985) (emphasis added).

[33] *Id.* (emphasis added).

[34] *Consumer's Guide*, *supra* note 6, at 77, discussing J. Otto & A. Towle, *Modern Biology*, at 580 (Holt, Rinehart & Winston: 1985) (emphasis added). Indeed, the explanation of evolution contained in a textbook published in 1981 is far more evasive than that contained in a text published in 1933, even though coverage of evolution in the 1930's was generally minimal. *Compare* Hegner, *Zoology* (1933) ("Charles Darwin's *Origin of Species* has replaced the concept of special creation with the theory of organic evolution. At the present time, biologists accept evolution as a fact but are actively engaged in efforts to discover how it has taken place") *with* H. Teter, G. Edwards, F. Fitzpatrick & D. Bain,

(footnote continued)

In addition, discussions of evolution are increasingly couched in terms which convey to the student that evolution is merely a belief or opinion rather than an established scientific theory based on reliable evidence.[35] One text is filled with statement such as "Humans are indeed unique, but because they are organisms, many scientists *believe* that humans have evolutionary history.[36] Another similarly states, "Many scientists *believe* the theory that humans developed from earlier forms of life."[37] These explanations wrongly suggest to the student that scientists' opinions are based on belief rather than fact, thereby supporting the religious creationists' approach to science:

> Remember, we do not base truth on scientific study, we base truth on the word of God.[38]

In addition to minimizing the significance of evolution by affording it scant coverage or by lacing discussions of it with conditional language, publishers distort or misstate the theory itself. For example, in an apparent concession to the fundamentalists, at least two texts dwell on the differences between humans and

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Living Things (Holt, Rinehart & Winston: 1981) ("Darwin asked some interesting questions and set forth a thought – provoking hypothesis about which people are seeking new clues in the light of modern science"), discussed in Zuidema, *Less Evolution, More Creationism in Textbooks*, Educ. Leadership, Dec. 1981, 217.

[35] *See generally Consumer's Guide*, *supra* note 6.

[36] *Consumer's Guide*, *supra* note 6, at 68 71, discussing R. Oram, *Biology Living Systems*, at 213 (1983).

[37] *Consumer's Guide*, *supra* note 6, at 23, discussing Teter, Edwards, Fitzpatrick & Bain, *supra* note 34, at 334 (1985 ed.); *see also* note 43, *infra*.

[38] Park, *Preachers, Politics and Public Education: A Review of Right-Wing Pressures Against Public Schooling In America*, 61 Phi Delta Kappan 608, 611 (1980) (quoting Jerry Falwell); *see also Consumer's Guide*, *supra*, note 6, at 82.

primates, but ignore the similarities.[39] One of these texts also wholly omits the age of the earth and the time-frame of geological eras.[40]

Finally, an increasing number of texts present creationism as an alternative theory of the origin of life.[41]

Consequently, textbook coverage of evolution in the 1980's is of less educational value than that contained in texts available twenty years ago,[42] misrepresenting the status of the current knowledge on evolution and providing youngsters with an incorrect, distorted or inadequate explanation of evolution or even worse, with a religious theory. *See* Points A, *ante* and II, *post*. This alarmingly "uncritical endorsement of the creationist theory" and inadequate treatment of evolution in three textbooks prompted the New York City Board of Education to bar the use of those textbooks in New York City schools in January of 1982.[43] Similarly, in September of 1985, the California State Board of

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[39] *Consumer's Guide*, *supra* note 6, at 86, 80, discussing Bauer, Magnoli, Alvarez, Chang-Van Horn & Gomes, *supra* note 32, G. Gottfried, G. Madrazo, L. Motz, J. Olenchalk, D. Sinclair & G. Skoog, *Biology*, at 80 (Prentice-Hall: 1985).

[40] *Id.*

[41] Skoog, *supra* note 4, at 125 (four out of five texts published in the 1980's for the first time mention creationism). Discussions of creation rarely appeared in earlier textbooks. A study of sixty-eight textbooks published between 1900 and 1968 revealed that only three texts contained references to creationism and each discredited this theory as scientifically untenable. *Id.*; *see also Books Water Down Study of Evolution*, *supra* note 24, Hartford Courant, § A, at 4 col. 5 (discussing study revealing increased coverage of creationism).

[42] *See* notes 4-5 *supra* and accompanying text.

[43] *City Schools Bar Three Textbooks said to Endorse Creationism*, N.Y. Times, Jan. 24, 1982, § A, at 1, col. 1. For example, one barred textbook stated, "Some people believe that evolution explains the diversity of organisms on earth. Some people do not believe in evolution .... No one knows for sure how many different kinds of living things came to be. But many people have developed theories to explain ..." *Id.*, *quoting*, Prentice-Hall's *Life-Science*.

Education rejected all seventh and eighth grade science textbooks submitted for adoption because of the texts' watered-down treatment of evolution.[44] The Board's superintendent declared, "The issue is not whether evolution should be taught — but how well it should be taught."[45]

Given the realities of the marketplace, although individual states and schools boards may continue to attempt to control the quality and integrity of the textbooks used in their public schools, this case will determine if and how well evolution will be taught and if creationism will be taught — well beyond Louisiana's borders. If Louisiana's statute is upheld, and other states enact similar legislation, the decline in the coverage of evolution in the Nation's textbooks will no doubt escalate and the coverage of creationism will increase.[46] Eager for sales, publishers will modify their texts and teaching materials to accommodate states with Balanced Treatment Acts. The lack of readily available materials,[47] and the readiness of creationist organizations to fill this gap will

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[44] Marshall, *Dinosaurs Ruffle Some Feathers in California*, Sci., Jan. 3, 1986, 18-19; Mathewson, *Survival of the Fittest*, 128 Sci. News, Oct. 5, 1985, 214.

[45] *Id.*, quoting Bill Honig, California's Superintendent of Public Instruction; *see also* Lindsey, *California's Back-to-Basics Reformer*, N.Y. Times, Aug. 3, 1986, § 12 (Educ. Supp.) at 52, 55. A different conclusion was reached by the State of Texas. In March of 1984, after ten years, Texas dropped a curb restricting references to evolution in texts and a requirement that books referring to Darwin's theory describe it as "only one of several explanations of the origins of humankind." Nonetheless, the revised criteria specifying the topics that should be taught in biology classes still does not mention evolution. *Texas Drops Curb on Science Books*, N.Y. Times, April 15, 1982, § A, at 1, 31, col. 1; Moyer, *How Texas Rewrote Your Textbooks*, Sci. Teacher, Jan. 1985, 22, 23; *see also Books Water Down Study of Evolution*, *supra* note 24, § A, at 4, col. 4.

[46] The direct response of publishers to anti-evolution legislation and sentiment from the 1920's to the early 1960's may well foreshadow their response to legislation in the 1980's. During that period, coverage of evolution in texts was minimal or non-existent. Grabiner & Miller, *supra* note 4, at 833; *see also McLean v. Arkansas*, 529 F. Supp. 1255.

[47] The present lack of textbooks is evident from the language of the Act which provides for the development of curriculum guides by each city and parish school board. La. Rev. Stat. Ann, § 17: 286.7 (West 1982).

make competition particularly stiff.[48] These same considerations will similarly influence publishers of paperbacks, supplementary materials and a broad array of teaching materials.[49] Thus, if the Act is upheld, there will be an increasingly limited number of textbooks and other materials available that teach evolution and do not expound creationism.

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[48] *Accord*, Dahlin, *supra* note 15, at 33. A number of creationist organizations already publish and distribute a range of texts and media materials. *See generally* Nelkin, *supra* note 12, at 77-84; Pearson, *Can Teachers Cope With Creationism?* Learning, Feb. 1982, 32; Welch, Mediros & Tate, *supra* note 14, at 205; *McLean v. Arkansas*, 529 F. Supp. at 1259 (describing organizations). For example, the Creation Science Research Center (CSRC) claimed that they sold 30,000 copies of their science and creation texts to each grade level in 1982. Nelkin, *supra* note 12, at 91 n. 20.

[49] For example, publishers of paperbacks distributed in school libraries yield to market pressures and threats of censorship. *Cf.* Taylor, *Once Upon A Time In the Marketplace*, J. Reading, Oct. 1985, 1, 5 (because of market pressures, publishers of paperbacks for distribution in school libraries are now publishing light, unrealistic teen romances instead of novels that deal with current social issues). This is not surprising since challenges to library materials frequently result in removal of those materials from school libraries. *See Limiting What Students Shall Read*, *supra* note 13, at 4; *see also A Lie Too Big to Bear-The Paluxy "Man" Tracks*, Sci. Integrity, Winter 1986, 3 (discussing creationist film company named "Films for Christ Associates"); Chambers, *Why A Statement Affirming Evolution*, Humanist, Jan./Feb. 1977, 23, 24 (discussing film produced by Moody Institute of Science distributed to 1,600 school districts in 1965); *Anti-Evolutionists Invade the Arts*, Sci. Integrity, Spring 1986, 6-7 (pressure from fundamentalists prevented teachers from bringing their students to a theater production about dinosaurs).

Because classroom time is so precious,[50] and because they implicitly vouch for the worth of the information they convey,[51] all educators have a responsibility to "separate the relevant from the irrelevant, the appropriate from the inappropriate." *See Board of Education, Island Trees Union Free School District v. Pico*, 457 U.S. 858, 913 (1982) (Rehnquist, J. dissenting). The inclusion of creationism in the Nation's texts and curricula would be a betrayal of that responsibility:

> Would the lay community really want to give quack doctors equal time with licensed doctors? To include the doctrine of Christian Science in books on health? To include astrological lore in books on astronomy ... [C]oncepts of pluralism, of equity and of participatory democracy, as they are defined in the political context are incongruous in science.[52]

The States of New York and Illinois respectfully submit that the inclusion of creationism in the public schools' curricula would

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[50] Zuidema, *supra* note 34, at 217, quoting, Edwords, *Why Creationism Should Not Be Taught As Science*, Creation/Evolution, Winter 1981, at 3. ("With so much to teach, there is simply no room for side-issues, controversies scientists do not take seriously, and the like. Should half the time be lost in two-model education, or more in multi-model education that would include astrology, human auras and the creation story of the Hopi Indians?").

[51] *See* Hechinger, *The Irreversible Effects of the "Creationism" Furror*, *supra* note 13, at § C, at 1, col. 4 (including creationism in curricula "compel[s] the majority of science teachers to give the imprint of scholarship to something they know is not so"); *see generally* Gieryn, *supra* note 5, at 394, *citing*, Meyer, *The Effects of Education as an Institution*, 83 Am. J. Soc. 55-77 (1977) ("Education functions in society as a legitimating theory of knowledge, defining certain types of knowledge ... as authoritative").

[52] Nelkin, *supra* note 4, at 39; *see also* Parker, *Behind The Evolution/Creation Science Controversy*, C. Board Rev., Spring 1982, 18, 21; Kitcher, *supra* note 7, at 176 ("No parent has the right to ask a teacher to disguise these facts, to mouth specious criticisms and to feign belief that they are serious arguments, to sit idly by while students decide an issue that they are in no position to resolve rationally").

serve no purpose but to promote religion. The sanctioning of its teaching would be inimical to the advancement of science education, and hence, to the states' and – Nation's – future.

POINT II

BECAUSE THE BALANCED TREATMENT ACT THREATENS TO TRANSFORM THE NATION'S PUBLIC SCHOOLS INTO FORUMS FOR THE TEACHING OF RELIGION, IT VIOLATES THE FIRST AMENDMENT.

If left with no alternative but to purchase books and teaching materials published to accommodate the Louisiana Act and other similar legislation, New York and Illinois may be forced to foist on the youngsters enrolled in their public schools religious dogma labelled as science. Thus, like Louisiana, New York and Illinois will be using their tax-supported public schools to endorse and promote religion in violation of the Establishment Clause of the First Amendment. *See McCollum v. Board of Education*, 333 U.S. 203 (1948); *Everson v. Board of Education*, 330 U.S. 1, 15 (1947); *Epperson v. Arkansas*, 393 U.S. 97, 104, 106-107; *Engel v. Vitale*, 370 U.S. 421 (1962); *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963).

Creationism, whether or not thinly disguised as a science, does not belong in the public schools. As the majority below recognized, the theory of creation is a religious belief. *Aguillard v. Edwards*, 765 F.2d 1251, 1256 (5th Cir. 1985); *see also McLean v. Arkansas Board of Education*, 529 F. Supp. 1255. And as they also recognized, the Balanced Treatment Act cannot be viewed in a vacuum, but must be seen as part of an ongoing attempt by religious fundamentalists to discredit evolution and inject creationism into the public school curricula. *Aguillard v. Edwards*, 765 F.2d at 1256-1257. As the court stated, the Act simply "continues the battle William Jennings Bryan carried to his grave." *Id.* at 1257.

The Fifth Circuit's holding, that the Balanced Treatment Act violates the Establishment Clause because it contains no valid secular purpose and its purported purpose of promoting academic freedom is a transparent sham[53] is consistent with the courts' doggedness in rebuffing the fundamentalists' persistent efforts. In *Epperson v. Arkansas*, 393 U.S. 97, for example, this Court struck down an Arkansas statute that criminalized the teaching of evolution, stating,

> The overriding fact is that Arkansas' law selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular interpretation of the Book of Genesis by a particular religious group.

Id. at 103; *accord*, *Wright v. Houston Independent School District*, 366 F. Supp. 1208 (S.D. Tex. 1972), *aff'd per curiam*, 486 F.2d 137, *cert denied*, 417 U.S. 969 (1974). And in *Crowley v. Smithsonian Institution*, 636 F.2d 738 (D.C. Cir. 1980), the court refused to enjoin the Smithsonian Institution from displaying exhibits on evolution, rejecting the contention that the displays were violative of the Establishment Clause. In *McLean v. Arkansas*, 529 F. Supp. 1255, the court struck down an Arkansas statute virtually identical to Louisiana's Balanced Treatment Act on the ground that it violated the Establishment Clause. *See also Hendren v. Campbell*, No. 557-0139 (Ind. Super. Ct., April 14, 1977) (prohibited use of textbook that included Christian fundamentalist doctrine under guise of "balanced-treatment"); *Daniel v. Waters*, 515 F.2d 485 (6th Cir. 1975) (statute requiring that all

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[53] The majority examined the statute under the prevailing test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971). Under *Lemon*, in determining whether a state statute violates the Establishment Clause, the relevant criteria are (1) whether the statute has a secular legislative purpose; (2) whether the principal or primary effect of the statute advances or inhibits religion; and (3) whether the statute fosters an excessive government entanglement with religion. *Id.*; *see also Lynch v. Donnelly*, 465 U.S. 668 (1984). Since the statute does not have a valid secular purpose, consideration of the second and third prongs of the test was not necessary. *Aguillard v. Edwards*, 765 F.2d at 1255, *quoting*, *Wallace v. Jaffree*, ___ U.S. ___, 105 S. Ct. 2479, 2490 (1985).

textbooks used in the public schools discussing origin of man contain biblical account of creationism held violative of Establishment Clause).

The principles of separation of church and state and of respect for our Nation's multiplicity of religious belief require adherence to these precedents and to the Fifth Circuit's decision. Nowhere is the First Amendment's prohibition against the merger of church and state more necessary than in the public schools, and nowhere must it be more rigorously enforced. *Epperson v. Arkansas*, 393 U.S. at 106-107; *see also West Virginia Board of Education v. Barnette*, 319 U.S. 624, 637 (1943). As Justice Frankfurter declared,

> Separation means separation, not something less. Jefferson's metaphor in describing the relation between Church and state speaks of a "wall of separation," not of a fine line easily overstepped. The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing not to say fusing, what the constitution sought to keep strictly apart.

McCollum v. Board of Education, 333 U.S. at 230-231. Because of mandatory attendance requirements, children's emulation of teachers as role models, *see Bethel School District No. 403 v. Fraser*, ____ U.S. ____, 106 S. Ct. 3159, 3165 (1986), and youngsters' susceptability to peer pressure, the state's authority and coercive power are greatest in the school setting. The teaching of religion – irrespective of how it is cloaked – must therefore be kept out of the public schools:

> To an impressionable student, even the mere appearance of secular involvement in religious activities might indicate that the state has placed its imprimatur on a particular religious creed.[54]

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[54] The teaching of creationism would involve the state in promoting and endorsing one particular religious view – that of the fundamentalists. Accordingly,

(footnote continued)

Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F.2d 1038, 1043 (5th Cir. 1982), *quoting, Brandon v. Board of Education of Gulderland Central School District*, 635 F.2d 971, 978 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981).

Accordingly, efforts to use the public school classroom as a forum for religious indoctrination have repeatedly failed to survive this Court's scrutiny. *See, e.g., Wallace v. Jaffree*, ___ U.S. ___, 105 S.Ct. 2479 (1986) (daily period of silence for meditation or voluntary prayer held unconstitutional); *Stone v. Graham*, 449 U.S. 39 (1980) (posting of Ten Commandments in public schools held unconstitutional); *School District of Abington Township v. Schempp*, 374 U.S. 203 (reading of Lord's prayer and Bible verses in public schools held unconstitutional); *Engel v. Vitale*, 370 U.S. 421 (prayer in public schools held unconstitutional); *McCollum v. Board of Education*, 333 U.S. 203 (religious instruction during school day on school property held unconstitutional). This instant attempt to use the public schools as a religious pulpit must likewise fail.[55] As this Court declared,

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given its potential impact on the textbook industry, if held constitutional, the Balanced Treatment Act threatens to impose a "pall of orthodoxy" over the Nation's classrooms. *See Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); *Board of Education, Island Trees Union Free School District v. Pico*, 457 U.S. at 892 (Burger, Powell, Rehnquist, O'Connor, J., dissenting) (discussing potential impact of required reading and textbooks on educational process). Nor can it be questioned that this is the fundamentalists' goal. *See Fundamentalist Parents Put Textbooks on Trial*, N.Y. Times, July 15, 1986, § A, at 14, cols. 1-2 (discussing efforts by fundamentalists in Tennessee to censor books; regarding tolerance, one fundamentalist stated, "We reject this concept, Jesus Christ being the only means of salvation ... We cannot be tolerant of religious views on the basis of accepting other religions as equal to our own").

[55] Consistent with the First Amendment, schools may, of course, choose to include discussions of religious beliefs – such as creationism – in other disciplines, such as literature, history, philosophy or anthropology. *Epperson v. Arkansas*, 393 U.S. at 107; *School District of Abington v. Schempp*, 374 U.S. at 203; *see also* Grover, *Evolving State Policy on Creationism*, Educ. Leadership, Dec./Jan. 1985-85, 69, 70; Levit, *Creationism, Evolution and the First Amendment: The Limits of Constitutionally Permissible Scientific Inquiry*, 14 J.L.Ed 227 (1985); Zuidema, *supra* note 34, at 218; Pierce, *Putting Darwin Back in the Book*, Time,

(footnote continued)

> The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance, to retard. In the relationship between man and religion, the State is firmly committed to a position of neutrality.

School District of Abington Township v. Schempp, 374 U.S. at 226.

Finally, if held constitutional, the Balanced Treatment Act may well have grave repercussions far beyond the Nation's classrooms. The teaching of creationism in Louisiana and other states that enact similar legislation will be tantamount to the establishment of a state religion. And, as the Court has warned:

> A union of government and religion tends to destroy government and to degrade religion.

Engel v. Vitale, 370 U.S. at 431.

March 16, 1981, 82. This might well enrich the curriculum, expose children to a diversity of ideas, and additionally teach them the value of tolerance; *cf.* note 54, *supra*.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

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